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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71 - 551

ARNOLD GOLDSTEIN,

Petitioner,

vs.

FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

ARNOLD GOLDSTEIN,

Petitioner,

vs.

FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Arnold Goldstein, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered July 23, 1971.

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Fifth Circuit was entered July 23, 1971. The court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether the requirement that a dentist licensed and in good standing in Illinois be required to take and pass another examination given by the State of Florida before being permitted to practice in that state violates his constitutional right to travel from one state to another.

2. Whether the requirement that a dentist duly licensed by the State of Illinois be required to take and pass an examination before being licensed to practice in Florida is reasonably related to the protection of the public health, safety or welfare of the people of Florida.

3. Whether the complaint raises substantial constitutional issues so as to require the district court to take jurisdiction.

STATUTORY PROVISION INVOLVED.

Florida Statutes, Ch. 466, Section 466.14 which is set forth in full in the Appendix.

STATEMENT OF THE CASE.

This is an action brought by Dr. Arnold Goldstein, a dentist, against the Florida State Board of Dentistry, alleging violations of the plaintiff's rights under Article I, Section 8 and Article IV, Section 2 and the 14th Amendment of the Constitution of the United States. Petitioner prayed that a three-judge court be convened, that sections of the Florida statute regulating the practice of dentistry be declared invalid, that the respondent be enjoined from denying the petitioner the right to practice dentistry in Florida, and that the respondent be directed to issue to the petitioner a certificate permitting him to practice dentistry in Florida. The respondent filed an Answer and a motion to Strike and Dismiss the Complaint. The trial court entered an order dismissing the Complaint for want of federal jurisdiction.

Petitioner, Arnold Goldstein, is a Doctor of Dental Surgery licensed to practice in the State of Illinois (R. 1). He is a graduate of the University of Illinois College of Dentistry. He received his DDS degree from that school on June 12, 1959 (R. 1). Petitioner has taken and passed the examination given by the Council of National Board of Dental Examiners of the American Dental Association and completed all requirements for National Board Certification (R. 1). Petitioner is a member of the American Dental Association, Illinois State Dental Association, Chicago Dental Society, and American Dental Society of Anesthesiology (R. 2). He is in good standing with and authorized to practice dentistry by the Depart-

ment of Registration and Education of the State of Illinois, the administrative agency which regulates the practice of dentistry in Illinois.

Dr. Goldstein engaged in the practice of dentistry in Illinois from September 1959 to March 1960 (R. 1, 2). The practice of dentistry in Florida is not distinguishable from the practice of dentistry in Illinois (R. 2). On March 24, 1969 the plaintiff established his residence in Florida (App. 2). On February 12, 1970 petitioner applied to the Florida State Board of Dentistry, the agency responsible for regulating admission into the practice of dentistry in Florida, for a license and annual renewal certificate. He submitted the statutory fees and agreed to provide proof of his professional and moral competence (R. 2). The Board denied his application for the sole ground that he chose not to take the examination authorized by Section 466.14 of Chapter 466 of the Florida Statutes (R. 2).

The Florida Statutes authorize the defendant to conduct examinations and to require satisfactory completion of its examination before issuing a license to practice dentistry in Florida (R. 3). Once having obtained a license a Florida practitioner may have this license renewed annually without being retested or making any other showing of competence, by applying for a renewal and paying the statutory fee (R. 3). The petitioner alleged in his complaint that the Florida requirements for admission to practice are without a rational basis, without compelling state interest, without relation to the general welfare and without consideration of the quality of practice in Florida (R. 4). He further alleged that he is being denied the right to practice while others of like

skills are not and that this constitutes an arbitrary classification causing him to suffer disabilities different from others similarly situated, a discrimination which deprives petitioner of life, liberty and property without due process of law and the equal protection of the laws as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States (R. 4).

Petitioner also alleged that the arbitrary exercise by the Board of its discretion denied him the right to earn a living as a dentist, and that the arbitrary classification imposed upon him was a restriction on his ability to move from Illinois to Florida in violation of his right to travel freely from State to State as guaranteed by Article I, Section 8 and Article IV, Section 2 of the Constitution of the United States. Jurisdiction was predicated upon 28 U.S.C.A. Section 1331(a) and 1343(3).

The lower court granted the respondent's motion to strike and dismiss the Complaint. The order states in part, as follows (R. 86):

> "The complaint herein does not allege a deprivation of equal protection, due process, or any other federally guaranteed right. No substantial federal question is presented. Nor is there any other basis for federal jurisdiction. Accordingly, it is
>
> Ordered and Adjudged that defendant's motion to dismiss be and the same is hereby granted. Plaintiff's complaint is dismissed."

The United States Court of Appeals for the Fifth Circuit affirmed the District Court.

REASONS FOR GRANTING THE WRIT.

I.

THE REQUIREMENT THAT A DENTIST LICENSED AND IN GOOD STANDING IN ILLINOIS BE REQUIRED TO TAKE AND PASS ANOTHER EXAMINATION GIVEN BY THE STATE OF FLORIDA BEFORE BEING PERMITTED TO PRACTICE IN THAT STATE VIOLATES HIS CONSTITUTIONAL RIGHT TO TRAVEL FROM STATE TO STATE.

The issues being raised here are of national importance because they strike at an archaic system which is being employed to discourage interstate travel by all dentists who wish to settle in another state. Licensing statutes, which in the 19th century and the early part of this century, served the proper purpose of protecting the public from the unscrupulous and the unskilled, no longer serve that function in regard to dentists who have already been licensed by a sister state. Instead their function is to insure the economic well-being of an entrenched group who fear the influx of out of state practitioners.

The experienced practitioner, removed from the academic scene, after years of practical experience is faced with having to once again prepare for an examination if he is interested in resettling in another state and wishes to continue in his profession. It is doubtful whether any professional in any field of endeavor could pass an examination designed to measure his general knowledge without considerable preparation. For example, many practicing lawyers or judges who are years removed from the law school, are not prepared to pass a Bar examina-

tion dealing with a variety of topics such as the Uniform Commercial Code, criminal law, evidence, federal taxation, administrative law, real estate, wills and estates, future interests, torts, etc. It takes time and it takes preparation to review these subjects and to become reacquainted with the nuances of the subject matter necessary to pass an examination.

For the dentist, torts and commercial law are replaced by such subjects as "pathology, radiology, bacteriology, anatomy, physiology, histology, chemistry, embryology, oral medicine, periodontics, orthodontics," etc. Florida Statutes, CH466, Sec. 466.14, (1). These are subjects with which the young graduating dentist is readily familiar. He is and should be required to demonstrate his knowledge to receive his license. Ten years ago Arnold Goldstein did precisely that. He took and passed the National Board examination prepared by the National Board of Dental Examiners and he took and passed the examinations required by the State of Illinois. The examinations which he passed and the proficiency which he demonstrated were equivalent to any test imposed by the State of Florida upon a young dentist being licensed at that time in the State of Florida. The standards for both Illinois and Florida were the same. Florida does not require the dentist which it admitted to practice ten years ago to once again take an examination, and there is no good reason why it should require that Goldstein once again take an examination before he can practice in that State. Goldstein was, and still is, prepared to prove by the testimony of leading dental authorities from various parts of the country that the standards for admission in Florida and the quality of practice in

Florida is in no way superior to the requirements for admission to practice in Illinois or the standards of practice in Illinois.

The real reason why Florida, or rather the dental profession in Florida, since it is the practicing dentists in Florida who largely determine what requirements should be imposed for admission, insist on a licensee from Illinois or New York or Massachusetts or California, or any other state with standards equal to or surpassing those of dentists in Florida, having to once again take an examination designed to measure the knowledge of a graduating dental student, is to discourage experienced practitioners from other states from settling in Florida. Certainly neither the Florida resident nor the citizen of any other state would imagine that a dentist from Chicago is less qualified to practice dentistry than a dentist from Miami. It is doubtful whether any dental authority could be found who would testify that the qualifications of a dentist licensed in Illinois are less than those of a dentist licensed in Florida. Yet this is exactly the presumption that must be made in order to preserve the requirement that an Illinois dentist must submit to an examination before being allowed to practice in Florida. In reality, the only function the Florida requirement serves is to protect the economic tranquility of the Florida dentist from the threat of outside invasion.

This purpose is not acceptable under our Constitution. In the *Passenger Cases,* 7 How. 283, 492 (1849), Chief Justice Taney stated:

> "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the

> United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

This court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1968), recognized the fundamental importance of the right to travel unrestricted between the states of the Union, in holding unconstitutional a one-year residency requirement for welfare recipients. In that case the states tried to justify the requirement by reference to four superficially laudatory state objectives: (1) planning of the welfare budget; (2) the objective testing of residency; (3) minimizing the fraudulent receipt of payments in more than one jurisdiction; and (4) encouraging early entry of new residents into the labor force. In rejecting this requirement this Court said (394 U.S. at p. 634):

> At the outset, we reject appellants' argument that a mere showing of a rational relationship between the waiting period and these four admittedly permissible state objectives will suffice to justify the classification. See *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional. Cf. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942); *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944); *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

The regulation by the State of Florida has neither a rational relationship to a permissible objective nor does it promote a *compelling* governmental interest, yet it serves as a deterrent to the free exercise of the right to travel from state to state. It is certainly a permissible objective to promote the health, safety and welfare of the citizenry of a state; yet it is irrational to conclude that dentists from Chicago are lacking in any skills possessed by dentists from Miami. In turn, there is certainly nothing to suggest that the protection of the economic well being of its dentists is a compelling governmental interest of a state. To the contrary, as stated in *Smith* v. *Texas*, 233 U.S. 630, 638 (1914):

> "None of the cases sustain the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position."

Using these criteria the Florida statute violates the fundamental right to travel from state to state.

Furthermore, there can be no doubt that this right to travel includes the right to settle and practice one's profession. *Truax* v. *Raich*, 239 U.S. 33, 39 (1915); *Smith* v. *Texas*, 233 U.S. 630 (1914). As was well stated by Judge Cravin in *Keenan* v. *Board of Law Examiners of State of North Carolina*, 317 F. Supp. 1350 (1970) at pp. 1361-1362:

> "The right to travel and the right not to be arbitrarily excluded from the legal profession, as pronounced in *Schware*, are here entwined. The right to work for a living in one's chosen occupation is for most people a prerequisite to the pursuit of happiness. If a man may be arbitrarily made to give up

> his lifetime endeavor—even for a year—in order to move his residence, it is idle to talk to him about 14th Amendment protection of personal freedom."

In the case at bar, in order to obtain admission to the State of Florida, it is necessary that the petitioner give up his practice, establish his residence in Florida and prepare for an examination. It is a great personal sacrifice which cannot help but deter persons like the petitioner from settling in that state. He is being required to do this for no rational reason. He is being denied the exercise of his right to travel freely between the states and to settle in another state by a statute which lost its proper reason to exist many years ago, and whose real reason for existence is certainly not one of compelling dimension.

II.

THE REQUIREMENT THAT A DENTIST DULY LICENSED BY THE STATE OF ILLINOIS BE REQUIRED TO TAKE AND PASS AN EXAMINATION BEFORE BEING LICENSED IN FLORIDA ARBITRARILY AND UNREASONABLY DENIES THE PLAINTIFF A LICENSE TO PRACTICE DENTISTRY IN THAT STATE.

There are certain freedoms which are fundamental to our society and among them is the right of the individual to pursue his lawful trade or profession so as to earn a livelihood. In *Smith* v. *Texas,* 233 U.S. 630, (1913), this Court said (p. 636):

> "Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor his liberty

> is restricted, his capacity to earn wages and acquire property is lessened and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

The petitioner is a dentist licensed to practice by the State of Illinois (R. 1). He practiced dentistry in Illinois for ten years before moving to Florida (R. 1, 2). He is a graduate of the University of Illinois College of Dentistry, D.D.S. 1959, a member of the American Dental Association, the Illinois State Dental Association, the Chicago Dental Society and the American Dental Society of Anesthesiology (R. 2).

The petitioner took and passed the "National Board Dental Examinations" given by the Council of National Board of Dental Examiners (R. 1, "National Board," Publication American Dental Association p. 3 (1971)). The Council was established in 1928 and is a standing committee of the American Dental Association. It is composed of nine members elected by the House of Delegates of the American Dental Association. The Council includes three members each from the American Association of Dental Examiners, the American Association of Dental Schools, and the American Dental Association ("National Board," Publication American Dental Association, p. 3 (1971)). At present fifty of fifty-three United States licensing jurisdictions accept the National Board Examination in lieu of a local written examination in the basic and clinical sciences. Florida, Delaware and Puerto-Rico do not accept this examination. "National Board," Publi-

cation American Dental Association, p. 4 (1971). Illinois recognizes a certificate granted by the National Board of Dental Examiners, Ill. Rev. Stat., 1969, Ch. 91 Section 58b, and the quality of the practice of dentistry and the skills of Illinois dentists are equal to the standards found in Florida or any other state (R. 2).

In the case at bar, the petitioner is being denied the right to travel to Florida, establish his residence there and practice his profession. The State of Florida refuses to issue him a license to practice dentistry, although he is as qualified to practice dentistry as dentists who have been issued licenses and who are practicing in Florida. The reason given for refusing to issue the license is the failure of the plaintiff to take the Florida examination (R. 2).

As pointed out by the Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238 (1956):

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clauses of the Fourteenth Amendment. (Citations omitted). A state can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."

In the present case there is no rational connection between the examination requirement and the plaintiff's qualifications to practice dentistry in Florida. Florida dentists are in no way superior to dentists practicing in Illinois. The qualifications of the plaintiff are equal to any of dentists already practicing in Florida. The Na-

tional Board Examination, given by so eminent and highly qualified a group as the Council of National Board of Dental Examiners meets any standard necessary to protect the health, safety or welfare of the people of Florida. Dr. Goldstein was prepared to introduce evidence in the trial court that the procedures he followed to become licensed in Illinois meet any reasonable standard required to protect the health, safety and welfare of the people of Florida.

Any limitation must bear a *reasonable* relationship to the public, health, safety or welfare. The requirement that the plaintiff once again pass an examination is not reasonable. This is especially true when the Court notes that a Florida dentist is not required to be retested when he seeks a renewal of his license but may simply obtain such a certificate upon payment of the statutory fee. Florida Statutes, 466.17(1). Even a licensee who gives up his Florida residence may apply for an annual renewal of his license. Florida Statutes, 466.17(1). The examination is, therefore, not related to ascertaining whether a dentist has maintained his skill or knowledge at a certain minimal level.

Finally, examinations relating to the licensing of lawyers may be distinguished from the licensing of dentists. This distinction is important since the defendant relied heavily on cases relating to lawyers in its argument in the lower court (R. 41, 42). While local law may vary from state to state and while it is reasonable to require a lawyer to demonstrate his knowledge of the law in the jurisdiction in which he wishes to practice, there is nothing to suggest that the teeth of the people of Florida are significantly different from the teeth of the people of Illinois.

The requirement that the petitioner submit to an examination in Florida when he has already qualified by taking and passing the National Board Examination and by having been admitted to practice in Illinois, where the standard of practice is equal to that in Florida, bears no reasonable relationship to the public health, safety and welfare. The application of the statute to plaintiff violates his rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment.

III.

THE COMPLAINT ALLEGES A BASIS FOR FEDERAL JURISDICTION BY RAISING CONSTITUTIONAL ISSUES OF NATIONAL IMPORTANCE.

The general rule in determining whether federal jurisdiction exists may be stated as follows (Wright, Federal Courts, Section 19, p. 55 (West Publishing Co., 1963)):

> "A corollary rule is that federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, then judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party claims it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. Dismissal for want of jurisdiction is appropriate only where the federal claim is frivolous or a mere matter of form."

In *Bell* v. *Hood,* 327 U.S. 678 (1946), this Court considered an action for damages against agents of the Federal Bureau of Investigation for false imprisonment of the plaintiff in violation of rights of due process and freedom from unreasonable searches and seizures as guaranteed under the Fourth and Fifth Amendments of

the United States Constitution. The District Court dismissed the Complaint for want of federal jurisdiction on the ground that the cause of action did not arise under the Constitution or laws of the United States. In reversing the lower court, this Court said (327 U.S. p. 681):

> "Before deciding that there is no jurisdiction, the district court must look to see the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent the party who brings a suit is master to decide what law he will rely upon and . . . does determine whether he will bring a 'suit arising under' the . . . [Constitution or laws] of the United States by his declaration or bill."

In response to the defendants' argument in that case that the complaint might not state a cause of action allowing recovery, the Court said (327 U.S. p. 682):

> "Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction."

The district court dismissed the Complaint in the case at bar for want of federal jurisdiction. The order of dismissal recites (R. 86):

> "The complaint herein does not allege a deprivation of equal protection, due process, or any other federally guaranteed right. No substantial federal question is presented. Nor is there any other basis for federal jurisdiction."

This recital in the order is incorrect as the most cursory examination of the Complaint reveals. The Complaint begins by alleging the basis for jurisdiction, as follows (R. 1):

> "This action arises under Article I, Section 8, Article IV, Section 2, and Section 1 of the 14th Amendment to the Constitution of the United States, and the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000)."

The Complaint then goes on to allege that plaintiff is a dentist, licensed in the State of Illinois who desires to practice in Florida. That the practice of dentistry in Florida is not distinguishable from the practice of dentistry in Illinois and that the plaintiff has the same skills now as he had when he practiced in Illinois (R. 2). The plaintiff applied for licensing but was refused by the defendant for the reason that he elected not to submit to the examination authorized by the Florida Statute (R. 2).

The Complaint states that the plaintiff (R. 4),

> ". . . for reasons without rational basis, without compelling state interest, without relation to the general welfare, and without consideration to the quality of the practice of dentistry to Florida, is

being denied the right and privilege of earning a living as a dentist while others of his profession of like skill, standing and qualification are not; and that this arbitrary classification of plaintiff which causes him to suffer disabilities different from others of his profession similarly situated is insidious discrimination which deprives the Plaintiff of life, liberty and property, *without due process of law* and the *equal protection of the laws as guaranteed him by Section 1 of the 14th Amendment to the Constitution of the United States.*" (Emphasis added)

The Complaint further alleged (R. 4):

". . . [T]his arbitrary classification of Plaintiff which causes him to suffer disabilities different from others of his profession similarly situated is a severe impediment, barrier and restriction on the ability and the desire of the plaintiff to travel or move from Illinois to Florida, which is in violation of his *right to travel freely from state to state as guaranteed by Article 1, Section 8, Article IV, Section 2, and the 14th Amendment, Section 1 of the Constitution of the United States.*" (Emphasis added)

Contrary to the order entered by the lower court the Complaint does allege violations of due process and equal protection as guaranteed by the Constitution as well as violations of other constitutionally guaranteed rights.

As stated in *Bell* v. *Hood*, 327 U.S. at p. 681:

"Before deciding that there is no jurisdiction, the district court must look to see the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States."

This review does not go to the merits of the case or even to the issue of whether the complaint states a cause

of action. The issues are decided after and not before the court has assumed jurisdiction. In the present case it is clear that the plaintiff is seeking relief under the Constitution of the United States and the trial court erred in dismissing the Complaint for failure to allege violations of "federally guaranteed" rights.

This Court in *Schware* v. *Board of Examiners*, 353 U.S. 232 (1956) said (p. 238):

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

The plaintiff argued that the application of the Florida statute to him was discriminatory, unreasonable and an effort by the state to exclude him from practicing his profession in that state. If he can prove his allegations and if his theory of law is correct then he is entitled to a judgment in his favor. In *Powell* v. *McCormack*, 395 U.S. 486 (1969), this Court said (p. 514):

> "It has long been held that a suit 'arises under' the Constitution if a petitioner's claim will be sustained if the Constitution [is] given one construction and will be defeated if [it is] given another."

The plaintiff is entitled to a judgment in his favor if the State of Florida is applying its licensing statute to him in an arbitrary and unreasonable manner. He had the right, therefore, to invoke the jurisdiction of a federal court to determine the merits of his case.

CONCLUSION.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 71-1314
Summary Calendar*

ARNOLD GOLDSTEIN,
Plaintiff-Appellant,

versus

FLORIDA STATE BOARD OF DENTISTRY
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

(July 23, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: Judgment AFFIRMED. See Local Rule 21.[1]

*Rule 18, 5th Cir. See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 431 F. 2d 409, Part I, (5th Cir. 1970).

[1]See *NLRB* v. *Amalgamated Clothing Workers of America*, 430 F. 2d 966 (5th Cir. 1970).

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1970

No. 71-1314
Summary Calendar

D. C. Docket No. 70-666-Civ-CF

ARNOLD GOLDSTEIN,
Plaintiff-Appellant,

versus

FLORIDA STATE BOARD OF DENTISTRY
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida
Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 23, 1971

Issued As Mandate Aug. 16, 1971

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District Of Florida

ARNOLD GOLDSTEIN,
Plaintiff.
vs.
FLORIDA STATE BOARD OF DENTISTRY,
Defendant.

No. 70-666-Civ-CF

ORDER

THIS CAUSE came before the Court on defendant's motions to dismiss and to strike and plaintiff's objections to interrogatories.

The complaint herein does not allege a deprivation of equal protection, due process, or any other federally guaranteed right. No substantial federal question is presented. Nor is there any other basis for federal jurisdiction. Accordingly, it is

ORDERED and ADJUDGED that defendant's motion to dismiss be and the same is hereby granted. Plaintiff's complaint is dismissed.

DONE and ORDERED at Miami, Florida, this 2 day of October, 1970.

/s/ Charles B. Fulton
Chief Judge

cc: Robinson & Randle
Tew & Tew

APPENDIX D

STATUTE INVOLVED

Florida Statutes, Ch. 466, Sec. 466.14

466.14 *Examinations; license certificates.*—

(1) When the board finds that the application and accompanying proof submitted by any person pursuant to §466.13, is satisfactory, it shall notify the applicant to appear before it for an examination at a time and place to be fixed by it. The examination shall be oral, visual, written, theoretical, practical, clinical, professional evaluation and of such a character as to thoroughly test the qualifications of the applicant to practice dentistry and may be taken from but not limited to the following subjects: Pathology, radiology, bacteriology, treatment planning, clinical dentistry, operative dentistry, prosthetics, crown and bridge technique, orthodontics, materials in dentistry, diet and nutrition, oral hygiene and prophylaxis, preventive medicine, periodontics, anesthesia, oral surgery, oral medicine, principles of medicine, materia medica and pharmacology, anatomy, physiology, histology, chemistry, embryology, dental history, this chapter and such subdivisions of these general subjects as relate to the practice of dentistry.

(2) All examination papers shall be filed with the secretary-treasurer of the board and kept for reference and inspection for a period of not less than two years. Examination papers while so retained shall be open to inspection only to board members and the executive director, the applicant himself, or by some person properly appointed by such applicant to examine same or pursuant to an order of a court of competent jurisdiction in a proceeding where the question of the contents

(Statute Involved)

of any such paper or papers is involved. The said board shall make a record of the examination grade of each applicant which shall be preserved for the two-year period as part of his examination paper.

(3) Should the applicant make a passing grade on his examination, he shall be granted a license by the board, and a license certificate signed by a majority of the board, including the chairman and the secretary-treasurer, bearing the seal of the said board, shall be issued, which certificate, when duly recorded as provided in this chapter, shall be evidence of his or her privilege to practice dentistry in this state; provided such licensee complies with the further provisions of §466.15.

History.—§10, ch. 14708, 1931; CCL 1936 Supp. 3534 (10); §14, ch. 26240, 1941; §8, ch. 61-471; §6, ch. 67-409.

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In The
Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-551

ARNOLD GOLDSTEIN,

Petitioner,

vs.

FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondent, Florida State Board of Dentistry, is not satisfied with either Petitioner's statement of Questions Presented for review or with the argumentative and factually unsupported manner in which the questions are framed and would instead prefer to state the questions presented as follows:

Petitioner's Questions 1 and 2 can be combined in the following statement:

1. Under the police powers of the State of Florida, the Legislature of Florida may require a dentist to make appli-

cation for and take an examination in Florida prior to his practicing in Florida, and that requirement is proper and constitutional.

2. That Petitioner's Complaint failed to allege a cause of action under the Constitution or federal law and raises no substantial constitutional issues.

STATEMENT OF THE CASE

A complaint was filed in the District Court of the United States, Southern District of Florida, Miami Division, by the Petitioner demanding a Three-Judge Court be constituted and convened under the provisions of 28 U.S.C.A. 2284 and to declare Florida Statutes Chapter 466, as it applies to the Petitioner on its face unconstitutional, and to enjoin the Respondent from not allowing the Petitioner to practice dentistry until he has complied with the Florida law and to issue the Petitioner an annual renewal certificate or other proper authority to practice dentistry in the State of Florida, and to further issue a preliminary injunction enjoining the Respondent from not allowing the Petitioner to practice dentistry even though he has not complied with the Florida Statutes.

The Petitioner alleges jurisdiction under Article 1, Section 8, Article IV, Section 2, and Section 1 of the 14th Amendment and for deprivation of rights, privileges and immunities secured by the Constitution and for equal rights of citizens within the United States.

The Respondent filed a Motion to Dismiss the Complaint on the grounds that the court lacked jurisdiction and that the Complaint failed to state a cause of action upon which relief could be granted, and further made a Motion to Strike

the entire Complaint on certain standard grounds and in addition thereto that the Complaint contained no more than bare conclusions and that said conclusions presented no claim or cause of action for relief by the court.

A Memorandum of Law in support of the motions by Respondent was filed in accord and compliance with the Rules of the United States District Court, Southern District of Florida, Miami Division.

The District Court issued its Order of June 15, 1970 removing the case for hearing and presenting the request contained in the Complaint for a Three-Judge Court to the Chief Judge of the Fifth Circuit in accordance with *Hargrave v. McKinney*, 302 F.Supp. 1381 (S.D. Fla. 1969) and denying Respondent's motions without prejudice to be renewed after a determination was made concerning the Three-Judge Court.

Thereafter, Respondent filed an answer on behalf of the Respondent. Petitioner thereupon filed a Memorandum of Law in opposition to Respondent's Motion to Dismiss and Motion to Strike; Respondent filed a Reply to the Memorandum of Law of the Petitioner. The District Court issued an Order on August 12, 1970 stating that the matter had been submitted to the Chief Judge of the Fifth Circuit and he had declined to order a Three-Judge Court "as no substantial constitutional question is presented" and further the District Court ordered that all pending motions would be heard by the Chief Judge of the District Court.

After notice and argument by respective counsel on the Motion to Dismiss and Motion to Strike, the District Court issued its order finding that the Complaint did not allege a deprivation of equal protection, due process or any other federally guaranteed right and further that no substantial

federal question was presented and further that there was no other basis for federal jurisdiction and granted Respondent's Motion to Dismiss the Complaint and dismissed it.

ARGUMENT

I. UNDER THE POLICE POWERS OF THE STATE OF FLORIDA, THE LEGISLATURE OF FLORIDA MAY REQUIRE A DENTIST TO MAKE APPLICATION FOR AND TAKE AN EXAMINATION IN FLORIDA PRIOR TO HIS PRACTICING IN FLORIDA, AND THAT REQUIREMENT IS PROPER AND CONSTITUTIONAL.

II. THAT PETITIONER'S COMPLAINT FAILED TO ALLEGE A CAUSE OF ACTION UNDER THE CONSTITUTION OR FEDERAL LAW AND RAISES NO SUBSTANTIAL CONSTITUTIONAL ISSUES.

There appears to the Respondent no need to separate the argument and therefore all questions or statements will be argued together.

Basically, the Petitioner would have this Court strike down all laws wherein the Constitution of the United States granted certain powers to the State under what has come to be known as the police powers.

The Petitioner waxes eloquent on what he terms an archaic system, but it is interesting to note that the very first case he cites is an 1849 case. That 1849 case for what it says is as good today as it was in 1849, just as the principles enumerated in the Constitution and cases by this Court granting the

privilege or right to practice dentistry or law in any state is not granted by the Federal Constitution but is solely in the province of the States.

The privilege or right to practice law (or dentistry) in any state is not a privilege granted under the Federal Constitution, but is solely within the province of the states, *Kovrak v. Ginsburg*, 358 U.S. 52 (1958), *dismissing for want of substantial federal question.*

The Petitioner in his Complaint alleges that the Board was created by the Legislature of the sovereign State of Florida, but omits 466.01 of the Florida Statutes, the objects and purposes of the Chapter, which are as follows:

> "466.01 Objects and purposes of chapter.--The practice of dentistry in the state is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the state. All provisions of this chapter relating to the practice of dentistry and dental hygiene and to the registration of dental laboratories shall be liberally construed to carry out these objects and purposes."

> "No federal interests arise save when federal guarantees of due process and equal protection appear to be thwarted by particular admission rules adopted by a State or by the manner in which these rules are applied. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); . . . Petitioner does not allege that our examination policy thwarts any federal guarantees in any

> particular way. She finds offense merely in the fact that she must submit to an examination as to her knowledge of law even though she had already been admitted to practice in Massachusetts . . . ."

The above language is taken from the case of *In re Russell*, Fla., 236 So.2d 767, in which the Supreme Court of Florida had a case before it identical to the facts of this case, with the exception that the Petitioner (Russell) did not want to take the examination for licensure to the Bar and in the Petitioner's (Goldstein) case, he does not want to take an examination to practice dentistry.

In the case of *Starr v. State Board of Law Examiners of Indiana*, C.C.A. Ind. 1947, 159 F.2d 305, Certiorari denied 67 S.Ct. 1348, 331 U.S. 830, 91 L.Ed. 1844, rehearing denied 67 S.Ct. 1750, 331 U.S. 870, 91 L.Ed. 1873, the Seventh Circuit Court of Appeals in deciding an appeal from the District Court of the United States for the Southern District of Indiana affirmed the District Court when said court was of the opinion that it lacked jurisdiction and the complaint stated no cause of action. The court in the cited case said:

> "The right to practice law in State courts is not a privilege granted by the Federal Constitution. Bradwell v. State of Illinois, 16 Wall. 133, 83 U.S. 130, 21 L.Ed. 442; In re Lockwood, 154 U. S. 116, 14 S.Ct. 1082, 38 L.Ed. 9299; and Mitchell v. Greenough, 9 Cir., 100 F.2d 184. See also In re McDonald, 200 Ind. 424, 164 N.E. 261, and Brents v. Stone, D.C., 60 F. Supp. 82. The Supreme Court of Indiana has exclusive jurisdiction to admit attorneys to practice law in its courts, § 4-3605, Burns' Ind.Stat.Ann. 1933. Affirmed."

The Federal Circuit Court of Appeals was confronted with

the same claims of federal rights being violated, as the case at bar and that Court said:

> "Plaintiff, a citizen of the United States and of the State of Indiana, claiming that he had been denied the privileges of a citizen as guaranteed by Article 4, section 2 of the Constitution of the United States and that he had been denied the equal rights of a citizen in violation of the Fourteenth Amendment, brought this proceeding, not against any individuals but against the 'State Board of Law Examiners for the State of Indiana and the Supreme Court of Indiana,' under the Federal Declaratory Judgment Act, section 274d, Judicial Code as amended, 28 U.S.C.A. § 400, for damages in the sum of $50,000 and for a declaratory judgment directing the Supreme Court of Indiana and the State Board of Law Examiners to certify plaintiff as a member of the Bar of the State of Indiana. From a judgment dismissing the complaint, appellant appealed."

As in the case at bar, the cited case is almost identical when the Court says:

> "The complaint alleges that plaintiff is a man of sterling character, with a keen intellect and a clear understanding of human relations; that he has an excellent record of civility, habits, and industry; that he has an education in military and government affairs and is a graduate Master of Sciences and Bachelor of Laws; that he has circumnavigated the globe and visited many foreign countries; and that he has held positions of importance and responsibility in times of peace and war.
>
> The complaint did not allege that he had been denied the right to take an examination, but it charged that notwithstanding the qualifications of the applicant

> and regardless of his grades in prescribed examinations, the Board of Law Examiners and the Supreme Court of Indiana have assumed 'Omnipotent Power and Authority' on the question of who shall, or shall not, be permitted to practice law in the courts of Indiana, and concluded that in rejecting plaintiff's application, they thereby showed partiality and 'biased judgment, prejudice, unethical manners and procedure, in their official duties, as public servants.'"

The decision reached by the Circuit Court of Appeals was:

> "The District Court, after argument and due consideration thereof, was of the opinion that the complaint stated no cause of action and *that the court lacked jurisdiction.* With this conclusion we agree."
>
> (Emphasis Supplied)

The Florida Supreme Court has ruled as early as 1933 and continuously thereafter that the practice of dentistry is a privilege and not an absolute unqualified vested right. The Court in *Spencer v. Hunt*, 147 So., 282 at page 284 states:

> "The practice of dentistry is not an absolute, unqualified, or vested right, but is subordinate to the police power of the state. In the proper exercise of the police power the Legislature may control and reasonably regulate the practice of dentistry. Such regulations must be reasonable and bear some relation to the service to be rendered by the practitioner, as well as to the end to be attained. The statute therefore, in so far as its purpose to regulate the practice of dentistry, is not contrary to public policy nor is it without the domain of the exercises of the police power. See Noble v. State, 68 Fla. 1, 66 So. 153."

The Supreme Court of Florida reiterates its contention in *Fischwenger v. York*, 18 So.2d, 8 at page 10 and 11, when it states:

> "The practice of dentistry in this State is not an absolute unqualified or vested right but is a privilege that may be exercised only in subordination to the police power of the State. It may be controlled and regulated by the legislature in the exercise of the police power. Spencer v. Hunt, 109 Fla. 248, 147 So. 282. When conflicts occur between the right of the citizen to follow such profession and the right of the state to preserve the general health and welfare, the right of the citizen in the matter must yield to the power of the state to prescribe such reasonable restrictions and regulations as may be necessary to protect the people from ignorance, incapacity, deception or fraud . . . . . "

The Supreme Court of Florida in the case of *Pridgen v. Sweat*, 170 So. 653, on pages 654 and 655, has stated:

> "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely; their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution, established for instruction on the subjects, scientific and otherwise, with which

such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable *by* reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when profession, or are unattainable *by* reasonable study or application, that they can operate to deprive one of his right to pursue a lawful vocation.

Applying this doctrine, the requirement of Section 10 that the examination 'shall be of such a character as to test the qualifications of the applicant to practice dentistry or dental surgery, and shall include such subjects as are taught in accredited dental schools,' is neither unreasonable nor arbitrary, if fairly and justly administered by the board in keeping with the plain language of the statute. The presumption is that public officers will do their duty, and there being no showing here of any discrimination or wrongful conduct on the part of the board, such presumption, in the absence of such showing would obtain. It might have been a desirable safeguard against possible discrimination if the statute had required the board of dental examiners to adopt a general rule or regulation specifying the subjects upon which all applicants would be examined, for in such cases the reasonableness and validity of such a general rule could easily be reviewed by the courts.* But in view of what was said in the above-cited case of Dent v. West Virginia, and also in the opinion of this court in Spencer v. Hunt, supra, we are by no means convinced that the clauses of the statute above referred to amount to a delegation of legislative power, or that it is so vague and indefinite

> in its meaning as to deny to an applicant for examination due process of law or the equal protection of the laws (Const. U.S. Amend. 14)."
>
> *Subjects now specified in the law.

These cases have been cited time and time again when dealing with privilege of practicing dentistry in the State of Florida.

In a Florida Supreme Court decision affecting dental laboratories, *Oshins v. York*, 150 Fla. 690, 8 So.2d 670, in which the same constitutional questions which are being urged by the Petitioner were urged by a dental laboratory when one of three questions presented to the Supreme Court was:

> "Do sections of an act which permit a person to occupy himself as a manufacturer and may, upon a written prescription of a licensed and registered dentist, construct, reproduce or repair bridges, plates or appliances to be used or worn as substitutes for natural teeth and sell them, providing that such person, firm or corporation shall not advertise to the general public, violate the Constitution of the State of Florida and of the United States of America by depriving the said person of his right to trade; of his property without due process of law; of his right of freedom of speech and of the press; of his right to contract; of his right to trade in interstate commerce; of the equal protection of the laws; is it arbitrary and unreasonable?
>
> The Lower Court answered this in the negative."

The Supreme Court used language which is helpful in understanding Florida's position concerning the practice of dentistry:

"The appellant's contention, when reduced to its last analysis is that he is not a dentist but is a business man and for that reason he should not be restrained from advertising in order to foster his business. It is true his type of business has been exempted from the dental act, but the same act which affords the exemption enjoins advertising by those exempted. The question is then, is the act in question arbitrary and without reason? The legislature found as a fact the practice of dentistry affected the public health. This is a fact of common knowledge. The legislature also found that only those duly qualified should practice dentistry. The purpose of the law is protection to the general public. Let us see how then the public is best protected. Appellant is admittedly not amenable to the act as a dentist. If the public be lured to the appellant's 'business establishment' by convincing advertisements the obvious purpose of appellant is to sell dentures without regard to medical need of same. If it be urged that they are never furnished except on prescription of a duly licensed dentist, then the question arises whose patient is the customer? If he comes to the business man (appellant) and is sent by the latter to a dentist, the temptation is great to prescribe dentures. The chances are enhanced that unless the prescription favors appellant's business, few patients will be sent to the same dentist thereafter. We do not think this practice is conducive to the loyalty that should exist between patient and doctor. See State Board of Optometry v. Gilmore et al., 147 Fla. 776, 3 So. 2d 708. We think therefore the legislature had a sound reason to enact a law to see that this situation would not happen. While we know a good dentist would not sacrifice his judgment for money, yet we

have truly said that those learned in the sciences sometimes recede from the common and accepted standards of honesty. Spencer v. Hunt, supra.

The decree is affirmed."

This Court has clearly held that State Courts are competent to decide questions arising under the Federal Constitution and in above-cited cases it is clear that Florida has held the duty and responsibility of the Respondent to examine a dentist in accordance with the mandate set down by the legislation does not violate the Constitution of the United States. (See cases following.)

Petitioner contends that for reasons without rational basis, and without state interest, Petitioner is denied certain rights and privileges. The above cited cases however destroy that contention. Section 466.01 of the Florida Statutes clearly sets forth the Legislative purpose of the Board and requires the Board to have a dentist file an application and take an examination to test his competence to practice dentistry in the State. Petitioner's complaint and exhibits attached thereto show on its face the correctness of the Court's decision.

Although Petitioner speaks of an arbitrary classification, nowhere in his complaint does he allege nor could he state for the lower court that he was being treated any differently than any other dentist in the State of Florida or in the United States who wishes to practice dentistry in the State of Florida. There is no requirement that a person be a resident of Florida in order to take the dental examination. Petitioner alleges that he is a bona fide resident of the State of Florida, although the law of Florida makes no requirement that he be a resident. Every dentist in the State of Florida, as far as education is concerned is an out of state dentist as Florida

has no dental school. The Florida law shows and Petitioner's complaint does not allege any different treatment than any other citizen of the United States in seeking licensure in Florida.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L.Ed. 2d 983, 83 S.Ct. 1759, this Court held with all members participating that a New Mexico Statute prohibits the advertising of eyeglass prices by radio did not violate the due process or the privileges and immunities clause of the 14th Amendment and further that such statutory prohibition on eyeglass price advertising did not impose an unconstitutional burden on interstate commerce. This case is cited not that the factual situations are identical but that the law stated therein applies perfectly to the case under this court's consideration. This Court in its opinion said:

> "As we said in Huron Portland Cement Co. v. Detroit, 362 US 440, 4 L ed 2d 852, 80 S Ct. 813, 78 ALR2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: 'In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' Sherlock v. Alling, 93 U. S. 99, 103; Austin v. Tennessee, 179 U. S. 343; Louisville & Nashville R. Co. v. Kentucky, 183 U. S. 503; The Minnesota Rate Cases,

230 U. S. 352; Boston & Maine R. Co. v. Armburg, 285 U. S. 234; Collins v. American Buslines, Inc., 350 U. S. 528.' 362 US, at 443, 444.

Like the smoke abatement ordinance in the Huron case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power. The legitimacy of state legislation in this precise area has been expressly established. Williamson v. Lee Optical of Okla., Inc. 348 US [374 US 429] 483, 99 L ed 563, 75 S Ct 461. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. 'State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." Huron Portland Cement Co. v Detroit, supra (362 US at 448)."

The law is so clear that it needs no citation that a state may enact laws under its police powers and although they affect interstate commerce, such laws must stand until Congress takes possession of the field under its supervisory authority to regulate such commerce, but such federal action must be specific in order to be paramount.

It is likewise abundantly clear that the Federal Government has not assumed jurisdiction of the practice of dentistry in states of the United States.

This Court in the case of *Lee Optical of Oklahoma vs Williamson*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461, cited in the case of *Head v. New Mexico Board of Examiners in*

Optometry, supra, involved an Oklahoma Statute dealing with the regulation of visual care and was upheld against claims of unconstitutionality by the Supreme Court of the United States in toto by all members of the Court, 8 in number, which heard the case. Mr. Justice Douglas, speaking for the Court and delivering the opinion states that the day is gone when this Court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. For protection against abuses by legislatures the people must resort to the polls, not to the courts. The Supreme Court thus held the State Law constitutional in all respects. Hence, the Supreme Court of the United States held the state law constitutional when dealing with regulations of visual care (law pertaining to ophthalmology or optometry).

The Petitioner is furnished no relief under Article 4, Section 2 or Section 1 of the 14th Amendment to the Constitution. In addition to the above cited cases, cases cited in the U.S.C.A. Constitution, Article 4, Section 2, Notes 87 and 88 plainly state that the privileges and immunities as contemplated by this clause of the Constitution are not applicable to the practice of dentistry. The case of *Keeley v. Evans*, D.C.Or. 1921, 271 F. 520 Appeal dismissed, 1922, 42 S.Ct. 184, 257 U.S. 667, 66 L.Ed. 426, concerns facts of an attorney who was a resident of the State of California and made application to the Supreme Court of Oregon for admission to practice law. The case clearly holds that the privileges and immunities clause of the Constitution is not applicable and the Federal Court does not have jurisdiction to require State Courts or can they themselves grant licensure. The case examines the law and states:

"It is beyond question that this, a federal court, has

> no power or authority to review, re-examine, or reverse the action of the state Supreme Court in denying a license to practice law in the state. The United States Supreme Court has so declared as to its own authority to re-examine or reverse, as a reviewing body, the action of a state court in disbarring a member of the bar of its own court. Selling v. Radford, 243 U. S. 46, 50, 37 Sup. Ct. 377, 61 L. Ed. 585, Ann. Cas. 1917D, 569. If that court has no such authority, it follows, by a much stronger reason, that this court possesses none.
>
> Nor can this court interpose to give complainant affirmative relief, such as to require the Supreme Court of the state to issue him a license to practice law in the state. This follows by reason of the distinct organization of the two courts, one being national and the other state, between which there is no jurisdictional co-ordination as it respects the administration of state policy. A federal court will administer the laws of the state in controversies in which it is given jurisdiction, but it will not interpose to direct or review the administration of state affairs."

The Court further stated:

> "Complainant is precluded, in view of the record, from at all insisting that he has been condemned without due process of law. Nor can he insist with confidence that he has been deprived of the privileges and immunities of a citizen of the United States. The right to practice law in the state courts is not such a privilege or immunity, within the meaning of the first section of the Fourteenth Amendment. Bradwell v. Illinois, 166 Wall. 130, 21 L. Ed. 442. As it relates to the privileges

and immunities of citizens of the several states, these, says Washington, Circuit Justice, sitting in the Circuit Court, in Corfield v. Coryell, 6 Fed. Cas. 546, 551, No. 3,230, may—

'be comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.'

Speaking of this clause of the Constitution, the Supreme Court, in Slaughterhouse Cases, 16 Wall. 36, 77 (21 L. Ed. 394), declares:

'Its sole purpose was to declare to the several states that whatever those rights,-as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other states within your jurisdiction.'"

"This is, in instance, what is required by the state statute: The applicant must show that he is a citizen of good moral character, which may be proved by any evidence satisfactory to the court, and that he is possessed of the requisite learning and ability. An attorney from another state may be admitted generally upon proof that he is a person of good moral character, which may also be proved by evidence satisfactory to the court. So it is obvious that the requirements for admission to practice in the state courts are not different from those that are exacted generally. At any rate, the Legislature has the right to prescribe qualifi-

cations for the office, to which the applicant or attorney must conform, as a prerequisite to his admission. Ex parte Garland, supra, 4 Wall. p. 379, 18 L.Ed. 366.

Now, in view of these regulations, what right, privilege, or immunity is extended to the citizens of the state to become practitioners at law that is not likewise extended to a citizen of another state? Obviously, there is none, and complainant has not been subjected to any different regulation. Nor have complainant's privileges and immunities been abridged, within the first section of the Fourteenth Amendment. *If the service is public, the state may prescribe qualifications, and require an examination to test the fitness of any person* to engage in and remain in the public calling. Smith v. Texas, 233 U. S. 630, 636, 34 Sup. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420. (Emphasis supplied)

It cannot be denied that an attorney's calling is public in character. He is an officer of the court, and his services are to the public. It is eminently proper that his qualifications and fitness to engage in the service shall be inquired into before he is permitted to enter the profession. So it has been declared that:

'State legislation, which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws, within the meaning of the Fourteenth Amendment, if within the sphere of its operation it affects alike all persons similarly situated.' Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, first clause of syllabus."

The Court has clearly held and it is the law today, that the State may prescribe qualifications and require an exami-

nation to test the fitness of any person to engage in a public calling. It is without contradiction that dentistry is a public calling, and the Florida Legislature in Section 466.01 of the Florida Statutes has declared dentistry to affect the public health and welfare and subject to regulations under the police powers.

As in the cited case, the Petitioner is being treated no differently than any other citizen of the State of Florida or any other state in seeking licensure in the State of Florida.

In *Keeley v. Evans*, supra, the Court went on to say:

> "The case of Dent v. West Virginia is peculiarly instructive, as it pertains to the power of the state to exact reasonable tests touching the qualification and fitness of applicants as a prerequisite to receiving the license of the state to engage in a public calling. Surely complainant has not been treated differently from any other citizen of another state, applying for license to practice law in this state. Nor has he in reality been treated differently from a citizen of this state applying to enter the practice herein. All are required to show to the satisfaction of the court their moral fitness to engage in such practice. This means that one must be possessed of a 'fair private and professional character,' as expressed by the court in Selling v. Radford, supra, before he is entitled to admission from another state. The prerequisite is neither exceptional nor discriminatory; nor does the procedure prescribed deny to complainant the equal protection of the law."

The cases cited by Petitioner under his Point I are not applicable to the factual situation in that Florida has no residency requirement for an applicant taking the dental ex-

amination and that anyone from Florida or any other state can take the examination and it is not necessary that an applicant in another state give up his practice, establish residence in Florida, and prepare for the examination.

In the case of *Smith v. Texas*, 233 U.S. 630 (1913), cited by the Petitioner, says in the next paragraph of the opinion, which gives meaning to the first paragraph:

> "If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. Re Lockwood, 154 U.S. 116, 38 L.Ed. 929, 14 Sup.Ct.Rep. 1082; Hawker v. New York, 170 U.S. 189, 42 L.Ed. 1002, 18 Sup.Ct.Rep. 573; Watson v. Maryland, 218 U.S. 173, 54 L.Ed. 987, 30 Sup.Ct.Rep. 644."

Petitioner's additional excerpt in the case of *Smith v. Texas*, supra, is preceded by the statement from that case:

> ". . . This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety . . . ."

In Petitioner's Petition, under Argument, he cites a corollary rule that federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no right. Nowhere has the Petitioner cited that his case arises under federal law or a Statute or otherwise and the rule he cites further states dismissal is appropriate where the federal claim is frivolous or a mere matter of form. Petitioner's complaint conforms to appropriate dismissal.

In the case of *Bell v. Hood*, 327 U.S. 678 (1946), cited by the Petitioner, affords him no help or merit as the Supreme Court held in that case that a suit may be dismissed for want of jurisdiction where the allegations claimed under the Constitution or federal Statutes clearly appear to be immaterial and made solely for the purpose of obtaining jurisdiction on which such claim is wholly insubstantial and frivolous.

Petitioner cites in his Petition cases and argument to the affect that each citizen has the right to travel freely from state to state. No one can quarrel with this argument and no one has quarreled with the Petitioner's right to set up a bona fide residence in the State of Florida.

Petitioner is simply required to do as all other citizens of Florida or other states desiring to practice dentistry in Florida--make application for and successfully complete the examination required by the Florida Statutes. Petitioner cites *Shapiro v. Thompson*, 394 U.S. 618 (1968), which has no bearing upon the case before this Court in any manner. A graduate dentist need not be a resident of the State of Florida at all and may take the examination for licensure as a dentist in Florida. The case of *Shapiro v. Thompson*, supra, concerns an act pertaining to welfare and the State's restriction thereof, requiring one year residency. This case has no bearing upon either the facts or the law of the case at bar.

Petitioner contends that the mere recitation of certain sections under the Articles of the Constitution automatically give rise to jurisdiction. This is just not so.

Petitioner attempts to make an argument which dehors the record concerning the Council of the National Board of Dental Examiners and infers without any authority that one passing this written examination only automatically entitles him

to licensure in Florida. This does not pass muster. The Petitioner failed in such recitation however to mention that he took the California examination for licensure in 1959 and 1960 (just after graduation from dental school) and failed these examinations. It is respectfully submitted that this argument is improper as it was not before the Court and has no bearing on the case.

Petitioner's citing Florida Statutes 466.17 (1) as applies to a dentist who has given up his Florida residence should be 466.17 (2), which contains the following language:

> ". . . No annual renewal certificate shall be issued to the holder of a conditional renewal certificate, if for good cause, the board determines that the applicant has not maintained the degree of professional skill and knowledge required when he was first licensed in this state or he has become physically or mentally incompetent, or has been guilty of immoral conduct. The board may, in its discretion, require said person to demonstrate to the board that he has maintained such professional skills and knowledge . . ."

CONCLUSION

No one has denied the Petitioner the right to travel to Florida, to establish his residence, which he alleges in his complaint he has done, and certainly he can practice dentistry in the State of Florida once he has applied for and successfully completed the examination for licensure in the State of Florida, and there is no requirement that he be a citizen of Florida, and there is no waiting period to take the examination.

Petitioner has cited no cases giving him any relief and the cases cited by the Respondent clearly establish that Petitioner's complaint did not state a cause of action and that he did not allege deprivation of equal protection, due process of any other federally guaranteed right and that no substantial federal question presented nor is there any basis for federal jurisdiction.

Wherefore, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

CERTIFICATE OF SERVICE

I DO CERTIFY that copy hereof has been furnished by mail this ..... day of November, 1971, to Ronald S. Cope, Attorney for Petitioner, One North LaSalle Street, Chicago, Illinois 60602.

.....

Attorney